Supreme Court, U.S.
FILED
APR 15 2004

No. 03-031455

In the Supreme Court of the United States

WARREN A. SAPPINGTON, IN HIS OFFICIAL CAPACITY AS JUDGE FOR THE CIRCUIT COURT OF MACON COUNTY, ILLINOIS, PETITIONER,

v.

MELISSA ROBINSON, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES T. FERRINI
DIANE M. BARON
MELISSA A. MURPHY-PETROS
Clausen Miller P.C.
10 South LaSalle Street
Chicago, Illinois 60603

*Counsel of Record

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN*
Solicitor General
RICHARD S. HUSZAGH
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

Counsel for Petitioner

QUESTIONS PRESENTED

The primary question presented here — whether a constructive discharge is a "tangible employment action" that precludes an employer from asserting the affirmative defense set forth in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) — is currently before this Court in *Pennsylvania State Police v. Suders*, No. 03-95 (*cert. granted* December 1, 2003). Unlike *Suders*, in this case the person who allegedly subjected the plaintiff to a constructive discharge was not the person who allegedly harassed her. These circumstances present two questions that warrant the Court's consideration.

1. The question presented in *Suders*, which is whether a constructive discharge is a "tangible employment action" that precludes an employer from asserting the affirmative defense recognized in *Ellerth* and *Faragher*.

2. Whether an employer may assert the *Ellerth*/*Faragher* defense where the plaintiff is subjected to a tangible employment action by a supervisor who is not the alleged harasser and who did not condone the harassment or act out of any discriminatory motive.

PARTIES TO THE PROCEEDING

The petitioner is Warren A. Sappington, in his official capacity as a judge of the Sixth Judicial Circuit Court, Macon County, Illinois. The respondent is Melissa Robinson. The other parties are defendants John P. Shonkwiler, in his official capacity as Chief Judge of the Sixth Judicial Circuit Court, and Macon County, Illinois.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. Certiorari Should Be Granted to Establish a Uniform and Predictable Standard Governing Availability of the *Ellerth/Faragher* Affirmative Defense in Constructive Discharge Cases 8

A. This Case Warrants Review Because the Court Has Granted Certiorari in Another Case Raising the Same Issue 8

B. The Seventh Circuit's Opinion Conflicts with *Ellerth* and *Faragher* 8

II. Review Should be Granted to Resolve a Conflict in the Circuits as to Whether a Tangible Employment Action Taken by a Supervisor Other Than the Plaintiff's Alleged Harasser Always Precludes the *Ellerth/Faragher* Affirmative Defense 11

CONCLUSION 14

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

Cases Page(s)

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) ..... *passim*

Caridad v. Metro-North Commuter R.R.,
191 F.3d 283 (2d Cir. 1999) 6

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) ..... *passim*

Johnson v. Booker T. Washington Broadcast Serv., Inc., 234 F.3d 501 (11th Cir. 2000) 12

Lee-Crespo v. Schering-Plough Del Caribe Inc.,
354 F.3d 34 (1st Cir. 2003) 12

Reed v. MBNA Mktg. Sys., Inc.,
333 F.3d 27 (1st Cir. 2003) 6

Suders v. Easton,
325 F.3d 432 (3d Cir. 2003), *cert. granted*,
124 S. Ct. 803 (Dec. 1, 2003) (No. 03-95) 11

Statutes:

42 U.S.C. § 2000e-2 ..... *passim*

Other Authorities:

Restatement (Second) of Agency (1957) § 219(2) 11

Robert L. Stern, Eugene Gressman,
Stephen M. Shapiro, Kenneth Geller,
Supreme Court Practice § 4.16 (8th ed. 2003) 8

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit (App. 1a-43a) is reported at 351 F.3d 317. The opinion of the U.S. District Court for the Central District of Illinois (App. 46a-80a) is unreported.

JURISDICTION

The Seventh Circuit's judgment was entered on December 9, 2003. App. 1a. The Seventh Circuit denied defendant Macon County's petition for rehearing and rehearing *en banc* on January 20, 2004. App. 44a-45a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides in relevant part:

§ 2000e-2. Unlawful employment practices.

(a) Employer practices. It shall be an unlawful employment practice for an employer —

(1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

STATEMENT OF THE CASE

This case involves a Title VII claim for damages against petitioner, in his official capacity as an Illinois State Court Judge, for alleged discrimination against respondent because of her sex. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(4) and 42 U.S.C. § 2000e-5(f)(3). It entered summary judgment against respondent, but the Seventh Circuit reversed and remanded the matter for trial.

Respondent Melissa Robinson ("Robinson") worked for several years without incident as a secretary and judicial clerk for petitioner Warren Sappington, a state court judge in Macon County, Illinois ("Judge Sappington"). Robinson claims that Judge Sappington sexually harassed her, thereby creating a hostile work environment, and that she was constructively discharged when Presiding Judge John Greanias — not the harasser — assigned her to work for another judge in a different building. The Seventh Circuit held that a constructive discharge precipitated by the official actions of a supervisor — even if he was not the harasser — is a "tangible employment action," the effect of which is to impose strict liability by precluding the employer from offering the affirmative defense set forth in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). App. 29a-37a.

As demonstrated by the successful petition for certiorari in *Pennsylvania State Police v. Suders*, No. 03-95, the federal circuits are deeply divided on whether a constructive discharge is a tangible employment action under *Ellerth* and *Faragher*, and "a uniform and predictable standard," *Ellerth,* 524 U.S. at 754, is needed on this recurring and important issue in federal employment discrimination law. The Court should accordingly review the Seventh Circuit's ruling on that issue, or at a minimum hold this case pending its decision in *Suders*.

Review is also warranted on an independent ground that raises another significant issue left unresolved in *Ellerth* and *Faragher*. Here, unlike *Suders*, the supervisor who allegedly harassed Robinson is *not* the person whose actions allegedly subjected her to a constructive discharge. The Seventh Circuit treated this distinction as having no legal consequence and held that the *Ellerth/Faragher* defense is unavailable whenever a constructive discharge is the result of an "official act" — *i.e.*, one taken by a supervisor pursuant to actual authority granted by the employer. This holding — which takes no account of whether the supervisor who allegedly imposed the constructive discharge was the harasser, condoned the harasser's misconduct, or himself acted out of a discriminatory motive — conflicts with decisions from the First and Eleventh Circuits and is inconsistent with the Court's rationale in *Ellerth* and *Faragher* for precluding the affirmative defense to vicarious liability for sexual harassment under Title VII.

1. Because the case was resolved on petitioner's motion for summary judgment, the record must be viewed in the light most favorable to respondent. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Viewed in that light, the record establishes the following facts.

Robinson complained that Judge Sappington's unwelcome behavior began in late July 1996 and continued through mid-October 1996. Judge Sappington did not physically force himself on Robinson or demand sexual favors from her as a condition of her job. Rather, he showed an excessive interest in Robinson's personal life and repeatedly made offensive and sexually suggestive comments.

During this time, the sexual harassment policy governing state court personnel stated that any employee who believed that he or she was being sexually harassed should report the matter to "his or her immediate supervisor" or "a higher

supervisory authority." In October 1996, Robinson told the administrative assistant for Judge Greanias, the presiding judge of the Macon County Circuit Court, that Judge Sappington was engaging in unwelcome behavior. Judge Greanias briefly placed Robinson on paid leave and then reassigned her to work for Judge Scott Diamond, whose courtroom was two floors below Judge Sappington's. Judge Diamond's clerk, displaced as a result of Robinson's reassignment, was not happy with being transferred, and when Judge Greanias returned from vacation a short while later, his assistant informed him that Robinson and Judge Sappington had agreed to work together again. According to Robinson, after this transfer back to Judge Sappington, he was "cold" and said he was angry with her for going directly to Judge Greanias with her complaints.

At various times, Judge John Davis objected to Judge Sappington's supervision of Robinson and told Judge Greanias she was allowed to do things she was not supposed to do, including discussing cases directly with litigants and using Judge Sappington's signature stamp without authority. Following a November 16, 1996, memorandum from Judge Davis to Judge Greanias complaining of such an incident, Judge Greanias decided to transfer Robinson to Judge Paul Francis, who worked in a different building.

Both Judge Francis and his staff, who had been with him for years, were upset about the transfer. When Judge Francis left Judge Greanias's chambers after learning of the decision, he slammed the door and glared at Robinson as he walked off. Judge Greanias told her that while she had done nothing wrong, he "had a judge to protect" and the only way to do so was to transfer her to the "only courtroom out of that building." According to Robinson, Judge Greanias also told her that Judge Francis was "very unhappy," that he "would make [her] first six months there hell," and that it was in her "best interest to

resign." Robinson heard that Judge Francis had a reputation as a "ladies man" and was concerned about working for him because Judge Sappington told her Judge Francis had "made moves" on court personnel. Robinson resigned from her job without ever working for Judge Francis or waiting to find out how the reassignment to him would actually work out in practice. Her suit did not allege the reassignment was made in retaliation for complaining about Judge Sappington's conduct.

2. The district court entered summary judgment against Robinson, ruling that Judge Sappington's conduct did not create an objectively hostile work environment (App. 63a-70a); that Robinson was not constructively discharged (App. 58a-60a); and that Illinois, as Judge Sappington's employer, would in any event prevail on the affirmative defense set forth in *Ellerth* and *Faragher* (App. 70a-78a).[1]

3. Reversing, the Seventh Circuit held that the record presented triable issues of fact as to whether Judge Sappington subjected Robinson to a hostile workplace environment, and whether Robinson's reassignment could be considered a constructive discharge. App. 19a-24a, 34a-36a. Petitioner does not challenge those determinations here.

---

[1] Not at issue here are other claims Robinson brought, including a Title VII claim against Judge Sappington in his individual capacity, dismissed because he was not her "employer," and a claim against him under 42 U.S.C. § 1983, dismissed as time-barred. Robinson also brought an official capacity claim under Title VII against Judge John Shonkwiler, the Chief Judge of the Sixth Judicial Circuit, but the Seventh Circuit affirmed the dismissal of this claim as merely duplicative of the similar official capacity claim against Judge Sappington because both claims actually targeted the State of Illinois as Robinson's employer. App. 41a-42a.

Addressing the issue raised in this petition, the Seventh Circuit considered whether a jury finding that Robinson was constructively discharged would preclude it from considering the *Ellerth/Faragher* defense. The court held that such a finding would establish a "tangible employment action," thereby foreclosing the *Ellerth/Faragher* defense, if the jury further determined that "Robinson's decision to resign resulted, at least in part, from Judge Greanias' official actions in transferring [her] to Judge Francis and in suggesting that she resign." App. 30a-37a.

In reaching this conclusion, the Seventh Circuit found "instructive" the analysis of the First and Second Circuits in *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (1st Cir. 2003), and *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), insofar as they relied on the reasoning in *Ellerth* and *Faragher* that no defense to vicarious liability under Title VII is justified where the statutory violation is accomplished through misuse of actual supervisory authority granted by the employer. App. 30a-33a. This rationale, the Seventh Circuit reasoned, warranted "draw[ing] a distinction between a constructive discharge caused by co-employees and a constructive discharge caused by supervisors." App. 33a. Illinois maintained that this same rationale required drawing a further distinction between situations where a constructive discharge was imposed by the "harassing supervisor" and situations where such a discharge was attributed to another supervisor. The Seventh Circuit did not recognize this further distinction, however, and instead treated both situations as legally equivalent under the *Ellerth/Faragher* framework. App. 33a, 36a-37a.

Finally, the Seventh Circuit held that a jury could find in this case that Illinois would not prevail on the *Ellerth/Faragher* defense if it were available. App. 37a-38a n.13.

REASONS FOR GRANTING THE WRIT

The Court should grant review because this case raises the same question as *Pennsylvania State Police v. Suders*, No. 03-95: whether a constructive discharge constitutes a tangible employment action for purposes of a sexual harassment claim under Title VII, thereby denying the defendant employer the ability to assert the defense recognized in *Ellerth* and *Faragher*. At a minimum, this petition should be held pending this Court's disposition of *Suders*.

An independent ground for review arises from another significant issue, not implicated in *Suders*, that also was left unresolved in *Ellerth* and *Faragher*. Here, unlike *Suders*, the supervisor accused of harassing Robinson is *not* the supervisor whose actions allegedly amounted to a constructive discharge. Contrary to the rulings in the First and Eleventh Circuits, the Seventh Circuit treated this distinction as having no legal consequence, holding that the *Ellerth/Faragher* defense is unavailable whenever a constructive discharge is the result of a supervisor's "official act" — *i.e.*, one taken pursuant by actual authority conferred by the employer on the supervisor. The Seventh Circuit's approach — which seemingly applies to *all* tangible employment actions — thus takes no account of whether the supervisor who imposed the action was the harasser, condoned the harasser's misconduct, or himself acted out of a discriminatory motive. Its approach is also at odds with the rationale of *Ellerth* and *Faragher* that strict vicarious liability is justified where the *active wrongdoer* was aided in accomplishing the statutory violation by the misuse of actual supervisory authority. *Ellerth*, 524 U.S. at 760-64; *Faragher*, 524 U.S. at 801-04, 807.

Petitioner seeks review of both questions presented, each of which is important to a uniform and predictable body of law in this frequently litigated area.

I. Certiorari Should Be Granted to Establish a Uniform and Predictable Standard Governing Availability of the *Ellerth/Faragher* Affirmative Defense in Constructive Discharge Cases.

A. This Case Warrants Review Because The Court Has Granted Certiorari in Another Case Raising the Same Issue.

Pennsylvania State Police v. Suders, No. 03-95, raises the same issue presented here: whether a constructive discharge constitutes a tangible employment action under *Ellerth/ Faragher*. The Court's decision to review the Third Circuit's opinion in *Suders* justifies review of the Seventh Circuit's opinion in this case as well. See Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, Kenneth S. Geller, *Supreme Court Practice* § 4.16, at 255 (8th ed. 2002). At a minimum, this case should be held pending the Court's judgment in *Suders* and then remanded for proceedings consistent with that judgment.

B. The Seventh Circuit's Opinion Conflicts with *Ellerth* and *Faragher*.

Review of the first question presented is also warranted because the Seventh Circuit's approach is inconsistent with the principles underpinning the Court's decisions in *Ellerth* and *Faragher*. Where the events establishing a constructive discharge are not already recognized under existing law as constituting a tangible employment action, the level of actual supervisory authority misused will be relatively modest, and it is less likely the action will be approved, or even reviewed, by higher management. By contrast, the unfairness to an employer of not being able to assert the *Ellerth/Faragher* defense in such situations will be correspondingly greater.

Under the Court's existing precedent, the *Ellerth/Faragher* defense is already excluded for a "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761; see also *Faragher*, 524 U.S. at 804-05, 808. Most of these tangible employment actions "inflict[] direct economic harm." *Ellerth*, 524 U.S. at 762. Whether a constructive discharge *also* forecloses the defense is therefore relevant only in *other* situations. Yet in such other situations, including constructive discharge, the reasons identified by the Court in *Ellerth* and *Faragher* for excluding the affirmative defense have limited application.

The Court explained that disallowing the *Ellerth/Faragher* defense for the actions it identified is justified because, in those cases, the supervisor misuses "the official power of the enterprise";[2] "[t]he decision in most cases is documented in official company records, and may be subject to review by higher level supervisors"; and "[t]he supervisor often must obtain the imprimatur of the enterprise and use its internal processes." *Ellerth*, 524 U.S. at 762. These criteria will be largely missing, however, for a constructive discharge that does not fit within the categories of tangible employment action already recognized by the Court.

When an employee is not fired or demoted, does not lose pay or benefits, and does not suffer a seriously undesirable reassignment, any "official power" exercised by the employee's supervisor is necessarily low on the scale of management authority. Indeed, such authority may often be difficult to distinguish from mere abuse of "apparent authority," which the Court rejected as a standard of strict liability. *Ellerth*, 524 U.S.

---

[2] This aspect of the Court's decision is discussed more fully below in connection with the second question presented.

at 759-60. Supervisory actions pursuant to such authority are also less likely to entail substantial involvement, or any involvement at all, by higher management.

Partly for the same reasons, situations not already recognized as tangible employment actions under *Ellerth* and *Faragher* are also ones where it seems most unfair to deny the employer the right to raise a defense based on its procedures in place to prevent and correct workplace harassment and the plaintiff's unreasonable failure to pursue those procedures.

Finally, pragmatic concerns counsel against recognizing a new and largely amorphous category of employment actions that permit strict employer liability for supervisor harassment of subordinates. Unlike a tangible employment action accompanied by economic consequences or in which the plaintiff endured the supervisor's action without resigning, there may be little or no readily verifiable evidence of the alleged constructive discharge. In the present case, for example, because Robinson never began working for Judge Francis, her case for establishing that her reassignment to him would be objectively intolerable rests on her testimony — which Judge Greanias disputes — that Judge Greanias predicted her situation with Judge Francis would be "hell" for six months and said she would be best off resigning, and her subjective fear that Judge Francis's reputation as a "ladies man" meant he would also make improper sexual advances to her.

Employees who quit their jobs and then claim unlawful discrimination under Title VII often allege they were constructively discharged. And if, based solely on evidence that is inherently difficult to verify or disprove, such employees can create a genuine issue of fact regarding the existence of a constructive discharge, even an ironclad defense under *Ellerth* and *Faragher* will not suffice to resolve the case at the summary judgment stage. See *Suders v. Easton*, 325 F.3d 432,

461-62 (3d Cir. 2003), *cert. granted*, 124 S. Ct. 803 (Dec. 1, 2003) (No. 03-95). That result will contravene the very goals the affirmative defense was designed to promote, namely prevention, self-correction and conciliation instead of litigation. For this reason as well, the Court should grant review of the first question presented in this case.

II. Review Should be Granted to Resolve a Conflict in the Circuits as to Whether a Tangible Employment Action Taken by a Supervisor Other Than the Plaintiff's Alleged Harasser Always Precludes the *Ellerth/Faragher* Affirmative Defense.

The Court should also grant review to decide whether, in a case where the plaintiff claims to have suffered a tangible employment action, the availability of the *Ellerth/Faragher* defense depends on the whether that action was directed by the plaintiff's alleged harasser. The Seventh Circuit's decision, treating this distinction as legally irrelevant, not only conflicts with other appellate decisions, but also disregards the justification articulated in *Ellerth* and *Faragher* for permitting strict vicarious liability.

The uncertainty on this issue traces back to *Ellerth* and *Faragher*. Those decisions found substantial support for their holdings in the "aided by the agency relation" principle embodied in Section 219(2) of the Restatement (Second) of Agency (1957) (hereinafter the "Restatement"). *Ellerth*, 524 U.S. at 760-65; *Faragher*, 524 U.S. at 801-08. The Restatement provides that an employer "is not subject to liability for the torts of his servants acting outside the scope of their employment unless . . . (d) the servant . . . was *aided in accomplishing the tort* by the existence of the agency relation." Restatement § 219(2) (emphasis added). Consistent with this principle, the Court's opinions strongly suggest that strict employer liability for sexual harassment cases under Title VII

is limited to situations where the harassing supervisor is the one who imposes a tangible employment action on the plaintiff or, if not the ultimate decisionmaker, is responsible for the action being imposed for discriminatory purposes. See, *e.g.*, *Faragher*, 524 U.S. at 802 ("It makes sense to hold an employer vicariously liable under Title VII for some *tortious conduct of a supervisor* made possible by use of his supervisory authority") (emphasis added); *id.* at 804 ("there are good reasons for vicarious liability for *misuse of supervisory authority*") (emphasis added). The Court's ultimate statement of its holding, however, does not expressly reference this qualification, and instead simply declares the unavailability of the affirmative defense "when the supervisor's harassment *culminates* in a tangible employment action." *Ellerth*, 524 U.S. at 765 (emphasis added); *Faragher*, 524 U.S. at 808 (emphasis added).

Appellate court decisions since *Ellerth* and *Faragher* conflict as to the proper resolution of this issue. In *Lee-Crespo v. Schering-Plough Del Caribe Inc.*, 354 F.3d 34 (1st Cir. 2003), the First Circuit, emphasizing the need for "a causal link between the tangible employment action and the alleged harassment," held that "the *harassing supervisor* must be the one who orders the tangible employment action or, at the very least, must be otherwise substantially responsible for the action." *Lee-Crespo*, 354 F.3d at 44 (emphasis added). Elaborating on this requirement, the court noted that the case before it "does not raise the issue of the company knowingly encouraging, endorsing, or adopting the supervisor's harassment." Similarly, in *Johnson v. Booker T. Washington Broadcast Serv., Inc.*, 234 F.3d 501, 509-10 (11th Cir. 2000), the Eleventh Circuit held that the *Ellerth/Faragher* defense applies unless the plaintiff's harasser is her supervisor and takes a tangible employment action against her.

Here, consistent with *Lee-Crespo* and *Johnson*, Illinois argued that it was entitled to assert the *Ellerth/Faragher* defense because there was "a complete lack of evidence to support a finding that *Judge Sappington* — the alleged harassing supervisor — took any tangible employment action against Plaintiff" and "Judge Greanias made the decision to transfer [her]." The Seventh Circuit, however, rejected that argument, and in so doing created a conflict with the First and Eleventh Circuits. App. 33a, 36a-37a.

Excluding the *Ellerth/Faragher* defense would make sense where a supervisor who imposes a tangible employment action, if not the harasser, condones the harassment or himself acts out of a discriminatory motive. But the Seventh Circuit's opinion does not impose any such requirement and thereby improperly deprives petitioner of the right to assert this defense, even if the jury were to conclude that Judge Greanias's actions reasonably sought to prevent any further harassment by Judge Sappington.

This conflict of authority prevents uniform national treatment of whether an employer is deprived of the *Ellerth/Faragher* defense for a tangible employment action decided by someone other than the harassing supervisor. Only this Court can resolve this important question in an area of the law that affects millions of employees and employers alike. The Court should accordingly grant review of the second question presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES T. FERRINI
DIANE M. BARON
MELISSA A. MURPHY-PETROS
Clausen Miller P.C.
10 South LaSalle Street
Chicago, Illinois 60603

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN*
Solicitor General
RICHARD S. HUSZAGH
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

*Counsel of Record

Counsel for Petitioner

April 2004